No. 16-1220

IN THE

Supreme Court of the United States

ANIMAL SCIENCE PRODUCTS, INC., *et al.*,
Petitioners,

v.

HEBEI WELCOME PHARMACEUTICAL CO. LTD., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

STEVEN P. LEHOTSKY
U.S. CHAMBER LITIGATION CENTER
U.S. CHAMBER OF COMMERCE
1615 H Street NW
Washington, D.C. 20062
(202) 463-5337

Counsel for the Chamber of Commerce of the United States of America

LUKE A. SOBOTA
Counsel of Record
JAN PAULSSON
PHILIPP KOTLABA
KIMBERLY H. LARKIN
E JIN LEE
THREE CROWNS LLP
3000 K Street NW, Suite 101
Washington, D.C. 20007
(202) 639-6500
luke.sobota@threecrownsllp.com

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber regularly files *amicus curiae* briefs in cases raising issues of concern to the nation's business community, including with respect to its international activities.

The Chamber's members and the broader business community have a substantial interest in the level of judicial deference U.S. courts give to a sovereign's interpretation of its law – whether that sovereign is domestic or foreign. The Chamber has repeatedly urged this Court to reconsider, or at least substantially cabin, *Seminole Rock*[2] (or *Auer*)[3] deference granted to a federal agency's interpretation of its own regulations. *See, e.g.*, *Garco Construction, Inc. v. Sec'y of the Army*, 856 F.3d 938 (Fed. Cir. 2017), *petition for cert. filed*, (U.S. Aug. 7, 2017) (No. 17-225). And the Chamber, as either a plaintiff, petitioner or an *amicus*

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[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made any monetary contribution to its preparation and submission. The parties were given timely notice and have consented to this filing.

[2] *See Bowles v. Seminole Rock & Sand Corp.*, 325 U.S. 410 (1945).

[3] *See Auer v. Robbins*, 519 U.S. 452 (1997).

curiae, has frequently urged American courts to scrutinize, rather than reflexively defer to, federal agencies' capacious interpretations of purportedly ambiguous statutory text. *See, e.g.*, *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014).

This case, which presents the doctrine of international comity, is a species of the genus. Although the issue here, unlike in the *Auer*[4] and *Chevron*[5] contexts, arises in an antitrust dispute between private parties and concerns a particular foreign sovereign's interpretation of its law, the Chamber is of the view that free enterprise does not benefit from an uncritical and reflexive deference by the courts to a sovereign regulator's interpretation of its own laws.

This may be particularly so where a foreign state does not operate with regulatory impartiality regarding state-owned enterprises and private actors, and regularly provides "informal" or "non-binding" mandates that can influence the behavior of state-owned and state-favored private enterprises, to the detriment of U.S. business. This Court should be circumspect lest deference to a foreign country's litigating positions regarding the scope of its laws become carte blanche to justify violations of U.S. law, for example by creating a price cartel in pursuit of an industrial policy objective.

SUMMARY OF ARGUMENT

This Court has long held that the doctrine of international comity requires a balancing of "international duty and convenience" with "the rights of its own

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[4] *See Auer v. Robbins*, 519 U.S. 452 (1997).

[5] *See Chevron U.S.A., Inc. v. Nat'l Res. Def. Council*, 467 U.S. 837 (1984).

citizens or of other persons who are under the protections of its laws." *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). In seeking affirmance of the Second Circuit's decision below, Respondents propose a standard of deference to foreign states that would distort, if not eliminate, this balancing test. They favor a "clear rule of conclusive deference" whenever a foreign sovereign "formally" appears with an interpretation of its domestic law that is not "obviously unreasonable."[6] While the views of a foreign state are entitled to substantial deference, affirmance of the Second Circuit's test would significantly distort the traditional weighing of interests under the doctrine of comity. The purpose of this *amicus curiae* brief is to note the potential ramifications of Respondents' reconception of the doctrine of comity on other areas of U.S. law.

ARGUMENT

I. The Doctrine of International Comity in U.S. Law

International comity is a multifarious concept.[7] The term has been deployed by courts and commentators to reference both the *deference* afforded to foreign sovereigns and the *doctrine* for determining the level

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[6] Brief in Opposition at 20, 24.

[7] *See generally* Donald E. Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11, 47-53 (2010) (describing three primary forms of modern U.S. comity analyses); William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2078-79 (2015) (surveying U.S. legal applications of comity and proposing a similar tripartite interpretative taxonomy).

of such deference.[8] This submission concerns international comity in its second sense.

The doctrine of comity exists as a tool for U.S. judges to mediate the legal issues that arise when a particular case implicates the sovereign interests of a foreign state. The concept of comity traces to conflict-of-laws jurisprudence of the late Middle Ages.[9] Seventeenth-century Dutch academic Ulrich Huber later opined that comity calls on a state to recognize and enforce rights created by other states, provided that such recognition does not prejudice the state or its subjects.[10]

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[8] Joel R. Paul, *The Transformation of International Comity*, 71 L. & CONTEMP. PROBS. 19, 27 (2008) ("[C]omity is offered [in *Hilton v. Guyot*] both as a rule for the enforcement of foreign judgments, and as an explanation for why foreign judgments should be enforced. In other words, comity is both a legal doctrine and also a justification for deferring to foreign judgments."); Donald E. Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11, 13-14 (2010) ("[a] court may apply the laws of another country by virtue of comity" but comity also "serves as a judicial canon" and "jurisprudential concept"). *See also Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court of S. Dist. of Iowa*, 482 U.S. 522, 555 (1987); *In re Maxwell Comm'n Corp.*, 93 F.3d 1036, 1046 (2d Cir. 1996).

[9] Ernest G. Lorenzen, *Huber's De Conflictu Legum*, 13 ILL. L. REV. 375, 391-92 (1919) (describing the recognition and enforcement of foreign court decisions "as a natural duty imposed by considerations of justice" in accordance with the Roman maxim *res judicata pro veritate accipitur*).

[10] ULRICH HUBER, DE JURE CIVITATIS, bk. 3, s. 4, c. 1, n. 42 (1694) ("Both should be enforced, on grounds of comity, for reasons of utility and convenience, unless it would cause prejudice to the state or to its citizens."). *See also* Ernest G. Lorenzen, *Huber's De Conflictu Legum*, 13 ILL. L. REV. 375, 378 (1919). As early as 1797, this Court acknowledged the doctrine of comity among nations by explicit reference to Huber's treatise. *See*

Relying on Huber, Justice Story wrote in his seminal monograph *Commentaries on the Conflict of Laws* that "there would be extreme difficulty in saying, that other nations were bound to enforce laws, institutions, or customs, of that nation, which were subversive of their own morals, justice, or polity."[11]

In the United States, the doctrine of comity affects a host of judicial doctrines, from foreign sovereign immunity[12] and judicial abstention[13] to the presumption against extraterritoriality[14] and approaches to

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Emory v. Grenough, 3 U.S. 369 (1797) ("The following extract from Huberus was translated for, and read in, this cause . . . .").

[11] JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 25 (4th ed. 1852).

[12] *See, e.g.*, *Republic of Austria v. Altmann*, 541 U.S. 677, 696 (2004) (characterizing foreign sovereign immunity as a "gesture of comity") (citing *Dole Food Co. v. Patrickson*, 538 U.S. 468, 479 (2003)); *Daimler AG v. Bauman*, 134 S. Ct. 746, 763 (2014) (noting "risks to international comity" posed by expansive view of general jurisdiction).

[13] *See, e.g.*, *Royal & Sun All. Ins. Corp. of Can. v. Century Int'l Arms*, Inc., 466 F.3d 88, 92 (2d Cir. 2006) (applying "doctrine of international comity abstention" in deferring to parallel proceeding in foreign court); *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 37 (2d Cir. 1987) (concluding that factors favoring antisuit injunction for foreign parallel proceeding were "not sufficient to overcome the restraint and caution required by international comity").

[14] *See, e.g.*, *EEOC v. Arabian Am. Oil Corp.*, 499 U.S. 244, 248 (1991) (the presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord") (citing *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20–22 (1963)); *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 169 (2004) (noting that "principles of prescriptive comity" limit U.S. antitrust law).

transnational discovery.[15] Even the application of customary international law in U.S. courts implicates notions of international comity.[16]

Although the application of comity in a particular case may implicate several different issues, the framework for weighing those issues is well established. Per *Hilton v. Guyot*, U.S. courts must balance "international duty and convenience" against "the rights of its own citizens or of other persons who are under the protections of its laws." 159 U.S. 113, 163-64 (1895).[17] Both considerations must be weighed against each other to

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[15] *See, e.g., Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court of S. Dist. of Iowa*, 482 U.S. 522, 543–44 (1987) (noting that the "concept of international comity" requires "particularized analysis" for discovery requests *outside* of the United States for use in *domestic* courts); *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 261 (2004) ("comity and parity concerns may be important as touchstones" for discovery *inside* the United States for use in *foreign* courts). Other instantiations of international comity include conflict of laws, *see Bank of Augusta v. Earle*, 38 U.S. 519, 589 (1839) ("[T]he laws of one [country] will, by the comity of nations, be recognised and executed in another . . . ."); and the ability of foreign sovereigns to bring actions in U.S. courts *see Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 408-09 (1964) ("Under principles of comity governing this country's relations with other nations, sovereign states are allowed to sue in the courts of the United States.").

[16] *Oetjen v. Central Leather Corp.*, 246 U.S. 297, 302-04 (1918) (noting that "principles of international law" apply in U.S. courts and rest "at last upon the highest considerations of international comity and expediency").

[17] *See also* Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L. J. 1, 8-9 (1991) (noting that *Hilton* "is the most commonly cited statement of comity in U.S. law"); *Oakey v. Bennett*, 52 U.S. 33 (1850) ("national comity does not require any government to give effect to such assignment, when it shall impair the remedies or lessen the securities of its own citizens").

properly account for the novel, sensitive, and difficult issues that often arise in cases involving transnational litigation.

This Court has applied *Hilton*'s balancing exercise for over a century to cases involving foreign legislative, executive, or judicial authorities.[18] This is seen in *United States v. Pink*, 315 U.S. 203 (1942), which Respondents cite in support of the Second Circuit's decision. Brief in Opp. at 24. In *Pink*, this Court delineated two questions: (i) whether the Russian decree at issue was *intended* by its drafters to have extraterritorial effect and (ii) whether the decree *should* be granted extraterritorial effect as a matter of U.S. law.[19] Although the *Pink* Court accepted the representations of the Soviet Government regarding the first inquiry, it exercised independent judgment in weighing the relevant interests at issue in respect of the second, including in particular the views of the Executive Branch. The Court found that the Russian

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[18] *Disconto Gesellschaft v. Umbreit*, 208 U.S. 570, 578-79 (1908) (noting that "international comity does not require the enforcement of judgments" that would prejudice the rights of local creditors); *Second Russian Ins. Corp. v. Miller*, 268 U.S. 552, 561 (1925) (finding that "adoption of foreign law by comity" would be "much beyond its limits as at present defined" and finding "no basis for the contention that the principle of comity would require" the same); *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court of S. Dist. of Iowa*, 482 U.S. 522, 546 (1987) (requiring courts to "take care to demonstrate due respect for . . . any sovereign interest expressed by a foreign state" but declining to "articulate specific rules to guide this delicate task of adjudication").

[19] *Pink*, 315 U.S. at 221 (1942) ("We hold that so far as its intended effect is concerned the Russian decree embraced the New York assets of the First Russian Insurance Co. . . . The question of whether the decree should be given extraterritorial effect is of course a distinct matter.").

decree was a facet of a larger "transaction[] resulting in an international compact between the two governments," which established diplomatic relations and settled liability claims between U.S. and Soviet nationals. *Pink*, 315 U.S. at 223. The Court concluded that the decree should be granted extraterritorial effect because "[i]t was the judgment of the [U.S.] political department that full recognition of the Soviet government required settlement of all outstanding problems including the claims of our nationals," and "[w]e would usurp the executive function if we held that that decision was not final and conclusive in the courts." *Id.* at 230. The *Pink* Court thus assessed all relevant circumstances before recognizing the extraterritorial effect of the Russian decree. Contrary to Respondents' assertion, the Soviet Government's interpretation of its decree was an element, but not conclusive, of the question presented in *Pink*.

II. Respondents' Proposed Test Would Materially Alter the Doctrine of International Comity

The Second Circuit's decision cites *Hilton v. Guyot* but then applies that decision in a way that effectively reduces its balancing test to a vanishing point. Pet. App. 13a. In pressing for affirmance in this Court, Respondents propose a test under which a foreign state's interpretation of its own law is given "conclusive" deference. Ascribing such weight to a single consideration is irreconcilable with the holistic balancing found in this Court's jurisprudence. It is settled law that a U.S. court should give substantial weight to the statement of a foreign government concerning its

own law.[20] But, as the United States argued at the certiorari stage, this should not preclude a U.S. court from considering "all relevant circumstances," including the "statement's clarity, thoroughness, and support; its context and purpose; the authority of the entity making it; its consistency with past statements; and any other corroborating and contradictory evidence." Invitation Brief for the United States as *Amicus Curiae* at 7-8.

Respondents argue that their position "allows courts to more capably and credibly balance the competing sovereign interests at stake." Brief in Opp. at 24. But under Respondents' "clear rule of conclusive deference," the foreign state's position would have a multiplier effect on the remainder of the comity analysis, which, when coupled with the substantial deference already afforded foreign sovereigns, could bring the traditional balancing under the doctrine of comity into disequilibrium.

This would be a clear departure from the articulation of comity in *Hilton* and its progeny, and would materially restrict the scope of substantive review that U.S. courts typically exercise when applying the doctrine of comity.

As elaborated in Part III *infra*, it is not uncommon for a foreign state to have a direct or indirect interest in the outcome of U.S. litigation. In such cases, the

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[20] *See, e.g.*, *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. of S. Dist. of Iowa*, 482 U.S. 522, 543 n.27 (1987) (evoking "the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states."); *United States v. McNab*, 324 F.3d 1266, 1241 (11th Cir. 2003) (noting that "[a]mong the most logical sources for [a] court to look to in its determination of foreign law are the [relevant] foreign officials").

post litem motam statement of the foreign sovereign should be measured against "any" other "relevant material or source," as provided in Federal Rule of Civil Procedure 44.1. There is no inconsistency between affording deference to a foreign sovereign and considering the totality of the circumstances – a representation by a foreign state does not render other materials and sources immaterial.[21]

In particular, Respondents' proposed test would give undue weight to the *method* by which a foreign sovereign expresses its views, with states receiving special, or even dispositive, deference when they "formally appear" in a pending U.S. case. Brief in Opp. at 24. Although a foreign state's "direct participation" signals the importance of that case to that state, the form of the state's participation should not negate full consideration of all relevant factors. The views of a foreign state should always be taken into account, but the particular *means* by which those views are expressed should not alter the *substantive* balancing of the array of considerations bearing upon a particular transnational dispute. Indeed, such a rule could

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[21] The weight afforded a particular foreign state's submission might include consideration of the reliability of the application of the rule of law in that jurisdiction. For example, only 97 of 215 countries and territories enjoyed a positive score (on a scale of -2.5 to 2.5) in the 2016 World Bank governance indicator for "rule of law." *See* WORLD BANK GROUP, WORLDWIDE GOVERNANCE INDICATORS: 1996-2016 (2018), http://info.worldbank.org/governance/wgi/index.aspx#home. According to the World Justice Project's 2017 Rule of Law Index, 75 of 113 countries score below 0.60 (on a 1.00 scale) in terms of their provision of "civil justice," with 42 of those countries scoring below 0.50. *See* WORLD JUSTICE PROJECT, RULE OF LAW INDEX: 2017-2018 (2018), https://worldjusticeproject.org/sites/default/files/documents/WJP_ROLI_2017 18_Online-Edition_0.pdf.

skew the application of the doctrine of comity in future cases, because the number of "formal representations" by foreign states would only increase if they received "conclusive deference." This could give foreign sovereigns undue influence over adversarial proceedings in which they have an interest.

III. U.S. Courts Have Applied the Comity Balancing Test in a Diverse Array of Cases Involving Foreign Law

Although presented in the specific context of whether there is a "true conflict" between U.S. and foreign law on competition, the case at hand presents the broader question of whether U.S. courts under the doctrine of international comity must afford "conclusive deference whenever a foreign sovereign formally appears with an interpretation of its own domestic law that is not obviously unreasonable."[22] Respondents' proposed test would, if accepted, threaten to upend other areas of U.S. law where the doctrine of comity obtains. As the cases below illustrate, the holistic balancing found in these other areas of U.S. law would be materially altered under Respondents' reconception of the doctrine of comity.

A. Cases Involving Questions of Foreign Sovereign Immunity

The doctrine of comity is manifested in U.S. jurisprudence on the liability of foreign states under the exceptions enumerated in the Foreign Sovereign Immunities Act (FSIA). *See* 28 U.S.C. § 1605 *et seq.*

Under the FSIA, U.S. courts may exercise jurisdiction over foreign sovereigns and their agencies and

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[22] Brief in Opposition at 24.

instrumentalities with respect to certain commercial activity. 28 U.S.C. § 1605(a)(2). In determining whether a foreign entity should be considered a state instrumentality, U.S. courts consider – but do not conclusively defer to – foreign laws bearing upon its legal status.

First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba (*Bancec*) concerned a letter of credit that Banco Para el Comercio Exterior de Cuba (Bancec), a Cuban bank, received in 1960 from Citibank, a U.S. banking and financial services company. 462 U.S. 611, 614 (1983).[23] Days after Bancec sought to collect on this letter, all of Citibank's assets were seized and nationalized without compensation by the Cuban Government. *Id.* When Bancec sought to enforce the letter of credit in U.S. district court, Citibank counterclaimed to obtain a set off reflecting the value of its nationalized assets, for which it had not received any compensation. *Id.* at 614-15. This counterclaim was predicated on the assertion that Bancec was the *alter ego* of the Cuban Government, and was thus liable to provide compensation for the expropriation. *Id.* at 617-19.

As the *Bancec* Court acknowledged, "the law of the state of incorporation normally determines issues relating to the internal affairs of a corporation." 462 U.S. at 621. Bancec was established under Cuban law as "an official autonomous credit institution for foreign trade with full juridical capacity of its own." *Id.* at 613 (quoting Law No. 793, Art. 1 (1960) (Cuba)). During the district court proceedings, a former Cuban government attorney confirmed that "under Cuban

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[23] At the time of the expropriation, Citibank was named First National City Bank. *See Bancec*, 426 U.S. at 613.

law Bancec had independent legal status." *Id.* at 616, fn. 3.

The *Bancec* Court nevertheless declined to defer to Cuban law. As Bancec had effectively been subsumed by the Cuban Ministry of Trade, any award in Bancec's favor would accrue to the Cuban Government. 462 U.S. at 615-16, 630-32. Applying Cuban law would thus have allowed "the real beneficiary of such an action, the Government of the Republic of Cuba, to obtain relief in our courts that it could not obtain in its own right without waiving its sovereign immunity and answering for the seizure of Citibank's assets." *Id.* at 632. The Court observed that "giv[ing] conclusive effect to the law of the chartering state in determining whether the separate juridical status of its instrumentality should be respected would permit th[at] state to violate with impunity the rights of third parties under international law while effectively insulating itself from liability in foreign courts." *Id.* at 622.

The *Bancec* Court underlined that its decision was the result of its balancing of competing equities which "announce[d] no mechanical formula for determining the circumstances under which the normally separate juridical status of a government instrumentality is to be disregarded." 462 U.S. at 633. Instead, it was "the product of the application of internationally recognized equitable principles to avoid the injustice that would result from permitting a foreign state to reap the benefits of our courts while avoiding the obligations of international law." *Id.* at 633-34.

If applied in the FSIA context, Respondents' position might establish the very "mechanical formula" that *Bancec* rejects, which could allow foreign States to "insulat[e] [themselves] from liability in foreign courts." *Bancec*, 462 U.S. at 622.

B. Enforcement of Foreign Arbitral Awards Under the New York Convention

The doctrine of international comity looms large in the jurisprudence of U.S. courts on whether to enforce foreign arbitral awards that have been set aside at the seat of arbitration by foreign courts applying their own domestic law.

The enforcement of foreign arbitral awards is governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38 (New York Convention). The New York Convention is implemented in the United States by Chapter Two of the Federal Arbitration Act. 9 U.S.C. §§ 201-08. Article III of the New York Convention sets out the conditions under which U.S. courts are to "recognize arbitral awards as binding and enforce them." New York Convention, Art. III, 9 U.S.C. § 207. In particular, courts may refuse recognition and enforcement where the award "has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." New York Convention, Art. V(1)(e).

The New York Convention does not mandate that the court in which enforcement is sought defer to the decision of the court where the arbitration was seated; this is left to the discretion of the enforcement court. *See, e.g., Karaha Bodas Corp. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 369 (5th Cir. 2003) ("As an enforcement jurisdiction, our courts have discretion under the Convention to enforce an award despite annulment in another country, and have exercised that discretion in the past."). In exercising this discretion, U.S. courts "weigh[] notions of 'public policy' in determining whether to credit the judgment of a court in the primary State

vacating an arbitration award." *TermoRio S.A. E.S.P. v. Electranta S.P.* (*TermoRio*), 487 F.3d 928, 938 (D.C. Cir. 2007). This entails balancing the deference owed to the foreign judgment setting aside the arbitral award and the interests of the party seeking enforcement of the arbitral award. *Ackermann v. Levine* (*Ackermann*), 788 F.2d 830, 842 (2d Cir. 1986) (balancing (1) the *res judicata* of a foreign judgment and (2) concerns about fairness to litigants).

Consistent with the substantial deference afforded foreign sovereigns, arbitral awards set aside at the seat of arbitration are presumptively unenforceable. *See TermoRio*, 487 F.3d 928, 936 (D.C. Cir. 2007) ("an arbitration award does not exist to be enforced in other Contracting States if it has been lawfully 'set aside' by a competent authority in the State in which the award was made"). This presumption recently led the Second Circuit to revoke a decision enforcing an arbitral award after it was subsequently set aside by a court at the seat of arbitration. *Thai-Lao Lignite* (*Thailand*) *Corp., Ltd. v. Gov't of the Lao People's Democratic Republic*, 864 F.3d 172, 182–89 (2d Cir. 2017).

In exceptional circumstances, however, U.S. courts will enforce an award that was set aside at the seat of arbitration, where deference to the foreign court's decision would be "repugnant to fundamental notions of what is decent and just." *Corporacion Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploracion Y Produccion* (*Pemex*), 832 F.3d 92, 106 (2d Cir. 2016) (quoting *Ackermann*, 788 F.2d 830, 837 (2d Cir. 1986) and *Tahan v. Hodgson*, 662 F.2d 862, 864 (D.C. Cir. 1981)); *see also Matter of Arbitration Between Chromalloy Aeroservices, a Div. of Chromalloy Gas Turbine Corp. & Arab Republic of Egypt*, 939 F. Supp. 907 (D.D.C. 1996).

Each case is assessed on its specific facts. In *Pemex*, for instance, the Eleventh Collegiate Court in Mexico set aside an arbitral award against an instrumentality of the Mexican Government on the ground that the instrumentality could not be compelled to arbitrate. In so holding, the Mexican court cited a Mexican law that had been enacted after the arbitration had commenced. 832 F.3d 92, 99 (2d Cir. 2016).

The Second Circuit refused to defer to the Mexican annulment. *First*, the Second Circuit held that deferring to the Mexican annulment of an arbitral would give effect to a "twelfth-hour invocation of sovereign immunity" that "shatters [the petitioner's] investment-backed expectation in contracting, thereby impairing one of the core aims of contract law." *Pemex*, 832 F.3d. at 108. *Second*, the Court opined that "[g]iving effect to the nullification would likewise impair the closely-related concept of avoiding retroactive application of laws." *Id.* *Third*, the Court held that "[t]he imperative of having cases heard – somewhere – is firmly embedded in legal doctrine," and recognizing the annulment would leave Petitioners without a "sure forum in which to bring its contract claims." *Id.* at 109. *Fourth*, recognizing the annulment would give effect to "a taking of private property without compensation," which "would be an unconstitutional taking" in the United States. *Id.* at 110.

Respondents' proposal for a "clear rule" in favor of a foreign sovereign's interpretation of its own law is difficult to reconcile with the discretion the New York Convention affords enforcement courts to recognize arbitral awards that have been set aside at the seat of arbitration.

C. Enforcement of Foreign Judgments in U.S. Courts

The doctrine of international comity is integrated into the jurisprudence of U.S. courts regarding the enforcement of foreign judgments. Generally, "a final judgment of a court of a foreign state . . . is entitled to recognition in courts in the United States." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481(1) (1987). However, in the absence of specific treaty commitments, "[n]o sovereign is bound . . . to execute within his dominions a judgment rendered by the tribunals of another State." *Hilton v. Guyot*, 159 U.S. at 116. A decision to recognize a foreign judgment necessarily involves a balancing exercise, as it "depend[s] on a variety of circumstances which cannot be reduced to any certain rule." *Id.* at 164 (quoting STORY, COMMENTARIES ON THE CONFLICT OF LAWS at § 28).

Courts in the United States have declined to recognize foreign judgments in instances where the proceedings failed to provide basic due process or otherwise violated public policy.[24] For example, in

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[24] *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482 (1987) (setting out grounds for non-enforcement of foreign judgments); *Hilton v. Guyot*, 159 U. S. 113, 167 (1895) ("Every foreign judgment, of whatever nature, in order to be entitled to any effect, must have been rendered by a court having jurisdiction of the cause, and upon regular proceedings, and due notice."); *Int'l Transactions, Ltd. v. Embotelladora Agral Regiomontana, S.A. de CV*, 347 F.3d 589, 594 (5th Cir. 2003) ("Notice is an element of our notion of due process and the United States will not enforce a judgment obtained without the bare minimum requirements of notice."); *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 608-09 (S.D.N.Y. 2014) (denying enforcement where judgment was procured through fraud and corruption); *Manez Lopez v. Ford Motor Corp.*, 470 F. Supp. 2d 917 (S.D. Ind. 2006)

Sanchez Osorio v. Dole Food Corp., 665 F. Supp. 2d 1307 (S.D. Fla. 2009; *aff'd sub nom Osorio v. Dow Chemical Corp.*, 635 F.3d 1277 (11th Cir. 2011)) (*Osorio*), the district court declined to enforce a judgment by a Nicaraguan trial court against several agricultural and chemical companies pursuant to Special Law 364, a Nicaraguan law specially regulating the procedures for lawsuits pertaining to compensation of persons injured by the pesticide DBCP. *Id.* at 1311-12. This judgment was part of a series of cases brought under Special Law 364, which collectively resulted in judgments of over US$2 billion. 665 F. Supp. 2d. at 1312.

The district court determined that Special Law 364 presented a number of concerns. Among other things, it established an irrefutable presumption that DBCP was the cause of plaintiffs' sterility. *Osorio*, 665 F. Supp. 2d at 1314 (citing Special Law 364, Art. 9), 1327 -29. It also provided the parties only eight days to submit evidence, evincing in the district court's view a "clear intent . . . to unfairly fast track these substantial and complex cases, and thereby deny DBCP defendants sufficient time to present an adequate defense." *Id.* at 1340.

In particular, the district court was presented with divergent conclusions from the Nicaraguan Supreme Court and the Nicaraguan trial court regarding the constitutionality of the jurisdictional provisions in Special Law 364. *Osorio*, 665 F. Supp. 2d at 1324-26. The district court noted that it "had broad discretion

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(refusing recognition of foreign judgment procured by fraud); *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406 (9th Cir. 1995) (generalized proof of systemic due process concerns sufficient to refuse recognition of foreign judgment).

to consider 'any relevant material or source, including testimony' in determining foreign law." *Id.* at 1322, 1326 (quoting Fed. R. Civ. P. 44.1). It thereby exercised its independent judgment to conclude that, under the Nicaraguan Supreme Court's decision, there was no jurisdiction over the judgment debtors. *Id.* at 1326.

The district court also denied enforcement of the Nicaraguan trial court's judgment on public policy grounds, as Special Law 364 was found to unfairly target "a narrowly defined group of foreign defendants and subject them to discriminatory provisions that d[id] not apply to domestic defendants[.]" *Osorio*, 665 F. Supp. 2d at 1336. The court found that this offended the general principle of equality before the law that is "basic to any definition of due process and fair play." *Id.* at 1341-42. In reaching its conclusions, the district court considered the totality of the circumstances, including contradictory interpretations of Nicaraguan law. *Id.*

Respondents' theory of conclusive deference to a foreign state's interpretation of its own laws is in tension with the decisions of U.S. courts refusing to recognize foreign judgments that offend minimal standards of due process or violate public policy.

D. Discovery Requests Made Under 28 U.S.C. § 1782

The doctrine of comity also finds expression in the discretion accorded U.S. district courts to grant discovery requests in aid of a foreign or international tribunal under 28 U.S.C. § 1782. District courts consider multiple factors when deciding whether to grant section 1782 discovery requests.

This Court's judgment in *Intel Corp. v. Advanced Micro Devices, Inc.* represents the clearest judicial statement on how district courts should approach section 1782 discovery requests. 542 U.S. 241, 252 (2004). It establishes a discretionary four-part test under which district courts consider a number of factors bearing upon whether to grant section 1782 discovery.[25]

One of the issues presented in *Intel* was whether section 1782 imposes a foreign-discoverability rule, which would prevent a U.S. court from ordering production of documents that the applicant could not obtain "if they were located in the foreign jurisdiction." 542 U.S. at 259-60. The *Intel* Court concluded that the documents need not be discoverable in the foreign jurisdiction, explaining that "[w]hile comity and parity concerns may be important as touchstones for a district court's exercise of discretion in particular cases, they do not permit our insertion of a generally applicable foreign-discoverability rule into the text of § 1782(a)." *Id.* at 260-61.

Given the hortatory aim of section 1782 of "encouraging foreign countries by example to provide

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[25] *Intel*, 542 U.S. at 264-65 (noting that a district court's discretion as to whether to grant a section 1782 application should be guided by four factors: (1) whether the material sought is within the foreign tribunal's jurisdictional reach and thus accessible absent section 1782 aid; (2) the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court jurisdictional assistance; (3) whether the section 1782 request conceals an attempt to circumvent foreign proof-gathering limits or other policies of a foreign country or the United States; (4) whether the request is unduly intrusive or burdensome).

similar assistance to [U.S.] courts,"[26] the *Intel* Court determined that the receptivity of the foreign court to the discovery provided by U.S. court could not dictate the inquiry. In particular the Court did not give conclusive weight to the *amicus curiae* brief of the European Commission, the putative beneficiary of the section 1782 application in that case, which opposed U.S. discovery on the ground that a "private complainant lacks any authority to obtain discovery of business secrets and commercial information" under European Union law. 542 U.S. at 272 (citing Brief for Commission of the European Communities as *Amicus Curiae* at 13, n. 15.).

The Second Circuit's understanding that comity requires "conclusive" deference to the formal view of a foreign sovereign sits uneasily with the *Intel* Court's determination that the non-discoverability of documents as a matter of foreign law does not control a district court's analysis as to whether discovery should be allowed under section 1782.

* * *

The doctrine of international comity requires substantial deference to the interests of foreign states along with consideration of the interests of the United States and those seeking the protection of its laws. The test applied by the Second Circuit below and advocated by Respondents in this Court threatens to upset this balance, with potentially undesirable consequences for other areas of U.S. law.

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[26] *Intel*, 542 U.S. at 252.

CONCLUSION

For the foregoing reasons, the Chamber respectfully requests that this Court reverse the judgment of the Second Circuit below.

Respectfully submitted,

STEVEN P. LEHOTSKY
U.S. CHAMBER
LITIGATION CENTER
U.S. CHAMBER OF COMMERCE
1615 H Street NW
Washington, D.C. 20062
(202) 463-5337

Counsel for the Chamber of Commerce of the United States of America

LUKE A. SOBOTA
Counsel of Record
JAN PAULSSON
PHILIPP KOTLABA
KIMBERLY H. LARKIN
E JIN LEE
THREE CROWNS LLP
3000 K Street NW, Suite 101
Washington, D.C. 20007
(202) 639-6500
luke.sobota@
threecrownsllp.com

Counsel for Amicus Curiae

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